

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANTHONY M. THOMAS,

Case No.: 3:19-cv-00567-MMD-WGC

Plaintiff,

Report & Recommendation of United States Magistrate Judge

V.

Re: ECF Nos. 1, 1-1, 7, 8, 10

**OFFICER CARTER OF THE
SHERIFF/POLICE HELP DESK/
DEPARTMENT,**

Defendant.

10 This Report and Recommendation is made to the Honorable Miranda M. Du, United States
11 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
12 § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and prose complaint (ECF No. 1-1). He has also filed a motion asking the court to schedule this case as soon as possible (ECF No. 7), a motion/letter requesting a speedy trial (ECF No. 8), and a motion for a jury trial as soon as possible (ECF No. 10).

I. IFP APPLICATION

18 A person may be granted permission to proceed IFP if the person “submits an affidavit that
19 includes a statement of all assets such [person] possesses [and] that the person is unable to pay
20 such fees or give security therefor. Such affidavit shall state the nature of the action, defense or
21 appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v.*
22 *Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all
23 actions filed IFP, not just prisoner actions).

1 The Local Rules of Practice for the District of Nevada provide: “Any person who is unable
 2 to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The
 3 application must be made on the form provided by the court and must include a financial affidavit
 4 disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

5 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
 6 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 7 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
 8 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

9 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
 10 therefore, the application should be granted.

11 II. SCREENING

12 **A. Standard**

13 “[T]he court shall dismiss the case at any time if the court determines that-- (A) the
 14 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
 15 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
 16 who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

17 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 18 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B) tracks
 19 that language. As such, when reviewing the adequacy of a complaint under this statute, the court
 20 applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d
 21 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to state a
 22 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule
 23 of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under Rule 12(b)(6) is

1 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723
 2 (9th Cir. 2000) (citation omitted).

3 The court must accept as true the allegations, construe the pleadings in the light most
 4 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395
 5 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent
 6 standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)
 7 (internal quotation marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a cause of
 9 action," it must contain factual allegations sufficient to "raise a right to relief above the speculative
 10 level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain
 11 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
 12 cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
 13 should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A dismissal should not be without leave to amend unless it is clear from the face of the
 16 complaint that the action is frivolous and could not be amended to state a federal claim, or the
 17 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
 18 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

19 **B. Plaintiff's Complaint**

20 Plaintiff brings this action against Officer Carter of the Police/Sheriff Help
 21 Desk/Department under 42 U.S.C. § 1983. He alleges that after he had been escorted out of several
 22 local casinos, he asked for help with bus fare back to California, and Officer Carter said no.
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1 42 U.S.C. § 1983 provides a mechanism for the private enforcement of substantive rights
2 conferred by the Constitution and federal statutes. Section 1983 "is not itself a source of
3 substantive rights, but merely provides a method for vindicating federal rights elsewhere
4 conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and citation
5 omitted). To state a claim under section 1983, a plaintiff must allege: (1) his or her civil rights
6 were violated, (2) by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48-
7 49 (1988). To adequately plead the section 1983 elements, a complaint must identify what
8 constitutional right each defendant violated, and provide sufficient facts to plausibly support each
9 violation. *See e.g., Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (noting defendants must
10 personally participate in misconduct to be liable under section 1983). The "threshold inquiry in a
11 § 1983 suit" requires courts "to 'identify the specific constitutional right' at issue." *Manuel v. City*
12 *of Joliet*, 137 S.Ct. 911, 920 (2017) (citing *Albright*, 510 U.S. at 271). "After pinpointing that right,
13 courts still must determine the elements of, and rules associated with, an action seeking damages
14 for its violation." *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

15 While Plaintiff has identified a state actor, he has not alleged facts that state any claim on
16 which relief may be granted. The court does not foresee a scenario under which Plaintiff could
17 state a claim based on the facts set forth so far. Therefore, this action should be dismissed with
18 prejudice. As a result, the remaining pending motions (ECF Nos. 7, 8 and 10) should be denied as
19 moot.

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III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain this action without prepaying the filing fee or giving security therefor. This order granting IFP status does not extend to the issuance of subpoenas at government expense.

(2) The complaint (ECF No. 1-1) should be **FILED**.

(3) The action should be **DISMISSED WITH PREJUDICE**.

(4) The motion asking the court to handle and schedule the case as soon as possible (ECF No. 7), motion requesting a speedy trial (ECF No. 8), and motion requesting a jury trial as soon as possible (ECF No. 10) should be **DENIED AS MOOT**.

The Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of being served with a copy of the Report and Recommendation. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

Dated: December 13, 2019.

William G. Cobb

William G. Cobb
United States Magistrate Judge